



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



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COMMISSIONER FOR HUMAN RIGHTS

POSITIONS ON CHILDREN'S RIGHTS¹

¹ This is a collection of Positions on children's rights from the Council of Europe Commissioner for Human Rights. It is a short summary of the findings of the Commissioner based on his country-monitoring and thematic reports, issue papers, recommendations, opinions and viewpoints. By collating these findings drawn from the different components of his work, the Commissioner presents a summary of his conclusions and recommendations concerning children's rights. The Positions will be continuously updated in the further light of the Commissioner's ongoing work.

Persistent and widespread violations of children's rights occur in all parts of Europe. As part of their daily lives, many children across Europe are subjected to different forms of physical, sexual and psychological violence and abuse, mainly inflicted on them by the adults upon whom they depend. Child poverty is an extremely serious problem, having a detrimental impact on the lives of many children far into the future. Its effects are exacerbated by the lack of provision of basic health and social care as well as the lack of a good standard of education for children. In some countries, some children still spend their youth isolated in large, obsolete and generally inadequate institutions for children with special needs. There is also a disturbing trend in Europe today to lock up more children at an earlier age for an increasing number of petty crimes. The basic right of children to have their views taken into account has not yet been guaranteed. Justice, schools, administrations and cities need to become truly child-friendly.

The situation of children is often an indication of the general state of respect for human rights in a country, particularly as they constitute one of the most vulnerable groups in society.

A child-centred approach

Children are holders of rights and should be respected for their inherent value as human beings as well as for their skills and competencies. As such, they need to be viewed as individuals – not merely as *objects* belonging to adults.

Our attitudes and policies towards children should be guided by the principle of the best interest of the child. This principle, recognised by Article 3 (1) of the UN Convention on the Rights of the Child (CRC), means that each child must be seen as an individual, and special consideration must be given to his or her particular circumstances.

It is noteworthy that the CRC extends this principle to cover *all* actions concerning children – not only actions taken by state authorities, parliamentary assemblies and judicial bodies, but also those taken by relevant private institutions. The best interest principle is a procedural rule which governs how we go about making decisions with regard to children. It is a legally binding rule that states must follow. The rule does not stipulate that children's interests must always come first, nor does it advocate that the rights of others be encroached. What it does do, however, is call for closer examination of the interests of a particularly vulnerable group. Thus, although the best interests of the child cannot always be the sole issue at stake, it should nevertheless be one of the major priorities and be given considerable weight in all decisions affecting children.

There are difficulties in defining this principle, and it is disturbing to see a patronising and abusive use of it by governments or individual adults who commit violations of children's rights in the name of "the best interests of the child". There are however two guidelines that are helpful in defining the principle:

- Children's best interests are represented by the substantive articles of the CRC.

- The views of the child are key to determining their best interest.

In considering a child's views, account needs to be taken of changes in his or her circumstances and development. With age and maturity, the child should be better able to make and influence decisions. This obvious point and legal obligation is often forgotten. The child's ability to form and express an opinion is also dependent on the fulfilment of several other rights, such as the right to education and the right to participate freely in cultural life. Also highly relevant are the freedoms of expression, thought, conscience, religion and association, as well as the right to privacy.

Independent human rights structures have a crucial role to play regarding the protection and implementation of children's rights. Where they do not already exist, specialised institutions, such as Ombudsmen for children, should be established by law and provided with appropriate means, budget and power.

Access to social and economic rights

Access to quality education is a basic right for every child, without exception. Equal access to education is central to the fight against wider discrimination and inequality in society. Education must be accessible, inclusive, provide for equitable conditions, equal opportunities and gender equity, and be free from discrimination. Every child should have the opportunity to reach his or her full potential through free access to education throughout the country. Pre-school education should also be made available. It is of particular importance that schooling in mainstream schools be made available to vulnerable children and children belonging to minority groups as well as to children with disabilities. A range of positive measures are needed to promote such inclusive schooling.

States should step up the fight against child poverty. Action plans are helpful tools in such endeavours. Any action plan against child poverty should seek, first and foremost, to define vulnerable groups and those most at risk. Education plays a key role in reducing child poverty, and it is therefore crucial for it to be free. Furthermore, direct subsidies for the benefit of children in "at risk" categories are deemed necessary and are the rationale behind many of the social and family benefits. Such support has to be appropriately targeted and sufficient to lift children – and their parents – out of poverty. Discriminatory barriers preventing the access of vulnerable children to appropriate health care and social services need to be removed. For this reason states need to ensure that all children are provided with the identification and documentation necessary for access to benefits and care.

Efficient protection against violence and abuse

All kinds of violence against children must be prohibited. This includes corporal punishment, sexual violence and psychological violence. Such a legal prohibition will aim at two key objectives:

- to prevent – or at least dissuade – abusers from offending
- to offer ways and means to seek redress in cases of violations

A legal prohibition sends a clear signal that any kind of violence against children is unacceptable, including at home. The idea is to encourage a change of attitude and

practice and to promote non-violent methods of child-rearing. A clear and unambiguous message about what is acceptable, and what is not, is very important. Adults responsible for children are sometimes confused about how to handle difficult situations. The line should simply be drawn between physical or psychological violence, on the one hand, and non-violence, on the other.

The bottom line is that no level of violence should be tolerated against children, whether for disciplinary or other purposes. This means that the exceptions contained in legislation in several European countries allowing “justifiable assaults” and “reasonable punishments” on children are not compliant with international human rights standards. That children, uniquely, should have less protection under the criminal law from assault is additionally discriminatory and completely unacceptable, given the obvious particular vulnerability of children.

Sustained public education and awareness-raising, including the promotion of positive parenting and education without violence, are also necessary to end the legal and social acceptance of violence against children. Specific educational efforts should target children in order to inform them about their right to protection from all forms of violence, and also about the services and assistance available to them.

In addition to corporal punishment, children across Europe are subjected to other forms of abuse, such as exploitation for cheap labour, sex and pornography which is often linked to trafficking. A wide range of measures must be taken to address these different forms of abuse. With respect to child labour, all the different forms of exploitation need to be addressed – from the more traditional rural and family-based child labour to prostitution, begging and drug trafficking rackets. Monitoring the different forms of exploitation is important so that swift and appropriate action can be taken. New forms of child protection, including more NGO involvement, must be developed to keep track of criminal offences relating to children and to guarantee adequate protection and support for victims.

Laws must evidently not only exist on paper, but must also be enforced and provide meaningful protection for children. Courts must be in a position to make a speedy decision on an issue, as a preliminary measure or injunction, if the case before them concerns a minor. Furthermore, if law enforcement is to be improved, the police, prosecutors and judges all need to be made aware of the problems of abuse and violence against children. In addition to the remedies available through the courts, complaint procedures that are easily accessible and child-friendly need to be established. Obstacles to children’s access to protection mechanisms – such as requiring parental authorisation to lodge a complaint – should be removed. Children’s complaints should always be taken seriously and officers, educators or social workers should be properly trained to listen to them. A confidential telephone line should be made available in every country, manned by highly trained professionals, so that any cases of abuse and violence can be reported and dealt with in an appropriate manner.

Juvenile justice

A caring society responds promptly, resolutely and fairly to juvenile offences. In this area, it is crucial to separate the concepts of “responsibility” and “criminalisation”. Where a child’s responsibility is disputed, there has to be a separate formal process to determine responsibility in a manner which respects the age and the capacity of the child. However,

this does not have to be a criminal process, nor involve the criminalisation of children. In this respect, governments should not focus on establishing an arbitrary age of criminal responsibility, but instead should look for holistic solutions to juvenile justice offences that do not criminalise children for their conduct.

It is particularly in the sanction process that juvenile justice needs to differ from ordinary criminal proceedings. Procedures for juveniles should always be child-friendly and there should be no redressment. The purpose is for rehabilitation and to establish responsibility, whilst promoting re-integration. This requires innovative and effective community sanctions. In practice, once the facts of an offence are established, there needs to be a multi-disciplinary assessment of what is required to ensure that the child is fully aware of the seriousness of his or her offence. Such an assessment should also determine how best to respond to the needs of the victim and prevent the culprit from re-offending. Proceedings should not identify the child publicly and should not be formally linked to the adult criminal justice system. For this to work, everyone involved, including judges and prosecutors, should properly trained. In principle, the offender's parents or other legal guardian should be involved, unless this is deemed counter-productive to the rehabilitation of the child. Whatever the process, there should be a means for the child to challenge the accusations and to appeal.

Imprisonment should generally be avoided. Any arrest or detention of a child should only be done as a last resort and for the shortest appropriate period of time. The only justification for detaining children should be if they pose a continuing and serious threat to public safety. This requires frequent periodic reviews by a judge to determine, on a case-by-case basis, whether detention is the appropriate option. Any detention of children should take place only in specific and child-friendly centres and they should be separated from any adult prisoners. Particular attention should be paid to young girls who are too often detained with adult women due to the lack of specific facilities. Contact with the family should be encouraged and facilitated, if that is in the best interest of the child. In general, the conditions should be humane and take into account the specific needs of an under-aged individual.

Full-time education for juvenile offenders is essential. For each young offender, there should be an individual programme of rehabilitation; a plan that should continue after the detention period has ended, supported by guardians, teachers and social workers. If relations with the parents are impossible, foster parents might be an alternative. Throughout the process, the child should be allowed to express his or her views and adults should listen to those views.

It should be recalled that a child in such a situation is sometimes more of a victim than an offender, since he or she often comes from a troubled background. This highlights the immense importance of early detection and prevention measures. The judiciary should be the last link in the chain after every other possible measure has been taken in an effort to prevent cases going to court. Support for families at risk, decisive action on domestic violence, social workers with outreach capacity, neighbourhood networks and a school which not only teaches, but also cares for every individual child are key components of a preventive strategy. Young persons themselves should of course be involved in these efforts and not be considered as mere objects to be socialised and controlled.

Separated, orphaned or abandoned children: institutions, placement and adoption policies

The time has come for de-institutionalisation of children living in institutions, especially in those which are large, obsolete and generally inadequate. Instead, children in need of care should be placed in smaller, family-type establishments or in foster homes. Institutionalisation should only be used as a last resort and only in the best interest of the child. Children in out-of-home care should receive a good standard of education so that they can live independently when the time comes. Children in need of out-of-home care for reasons other than offending should not be mixed with young persons in conflict with the law. Furthermore, the placement of a child in care should be reviewed periodically and the functioning of institutions adequately monitored. Where children are placed in foster care, the authorities should establish standardised procedures for the recruitment, selection, training, support and supervision of foster families. It is important that social services make every possible effort to keep families together and prevent children from being separated from their parents. Decisions governing the placement of children in out-of-home care should preserve, as far as possible, the proper balance between public intervention and the right to private and family life as well as the best interest of the child. The participation of children themselves in the decision-making procedure regarding their placement is also particularly important. As custody decisions are directly related to the fundamental rights of all family members, a court should be involved in making the initial decision as well as in its regular review.

KEY RECOMMENDATIONS ON CHILDREN'S RIGHTS

A child-centred approach based on the principle of the child's best interest should govern all decisions regarding children. Children should be viewed as individual subjects and their views should be taken into account, with due regard for their development and maturity.

Steps should be taken to ensure a good standard of education for all children. This means that it should be accessible, inclusive, and provide for equitable conditions, equal opportunities and gender equality, as well as being free from discrimination. Pre-school education is to be encouraged.

States should set up adequately targeted and resourced action plans against child poverty, defining vulnerable groups and those at risk. They must remove discriminatory barriers (including the lack of proper identification and documentation) which may prevent access to social services and health care.

All violence against children should be prohibited, including corporal punishment. A change of attitudes and practices should be encouraged, and non-violent methods of child-rearing should be promoted.

While it is necessary to respond promptly to juvenile offenders, they should not be criminalised and states should look for holistic solutions for under-aged offenders. The sanction process in juvenile justice should differ from the ordinary criminal procedure: avoiding retribution; establishing responsibility; and, at the same time, promoting re-integration. Procedures should be child-friendly and imprisonment should be used only as a last resort. Children should be allowed to participate in the proceedings and express their views. Recalling that these children are sometimes very much victims, emphasis should be placed on preventive measures.

Children in need of care should be placed in family-type establishments or in foster homes, replacing obsolete and generally inadequate institutions. Decisions regarding placement should preserve the right to private and family life as well as the best interests of the child, and take into account the child's own views. They should be regularly reviewed. Children in out-of-home care should receive a good standard of education to prepare them to live independently later in life.